

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
TracFone Wireless, Inc.)	
)	
Petition for Forbearance)	
)	
To: The Commission)	

OPPOSITION TO TRACFONE PETITION FOR FORBEARANCE

Dobson Cellular Systems, Inc. ("Dobson") hereby opposes the above-captioned Petition for Forbearance ("Petition") of TracFone Wireless, Inc. ("TracFone"), a pure CMRS reseller.¹ TracFone seeks forbearance from the requirements of Section 214(e)(1)(A) of the Communications Act, which otherwise make TracFone ineligible to apply for Eligible Telecommunications Carrier ("ETC") status. As demonstrated below, the relief sought by TracFone would be inconsistent with core universal service principles and the Commission's recent orders with respect to the showings required of applicants for competitive ETC status. TracFone has no network, and therefore provides nothing to consumers that the high cost fund should support. Grant of the Petition also would be contrary to the public interest. Accordingly, the FCC should deny the Petition.

¹ TracFone Wireless, Inc. Petition for Forbearance, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed June 8, 2004) ("Petition"). Simultaneous with the Petition, TracFone filed a petition for ETC designation in New York. TracFone Wireless Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed June 7, 2004).

I. FORBEARANCE FROM SECTION 214(E)(1)(A) FOR PURE RESELLERS WOULD BE INCONSISTENT WITH THE FUNDAMENTAL PURPOSES OF UNIVERSAL SERVICE

Congress directed the Joint Board and the Commission to base universal service policies on, among others, the principle that consumers in all areas of the nation, particularly in rural, insular and high cost areas, “should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”² Furthermore, Congress and the Commission recognized that universal service was needed in rural and high cost areas because it is more expensive to provide service to consumers in such areas. The Commission has stated that “[o]ne of the primary purposes of universal service support is to help provide access to telecommunications service in areas where the cost of such service otherwise might be prohibitively expensive.”³

Universal service promotes competition in local markets, as envisioned by the 1996 Act; it also aids carriers in serving high cost areas at affordable rates. In the case of wireless telecommunications, such support is particularly important in providing the capital to wireless carriers necessary not only to expand their coverage to new areas where business circumstances might not otherwise justify such investment, but also to construct infrastructure that can extend access to a carrier’s services into “hard-to-reach”

² 47 U.S.C. § 254(b)(3).

³ Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 and 00-256, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, 16 FCC Rcd 11244, 11251 (2001).

areas of its licensed territory that otherwise appear covered on its coverage maps but, by reason of terrain topography, are not receiving adequate signals.

As a facilities-based carrier, Dobson fully understands the importance of these principles. From its inception, Dobson has always strived to provide high-quality wireless services to consumers in rural America that are comparable to services available in urban areas. Dobson is well aware of the high capital costs associated with building out infrastructure to provide service to rural areas characterized by high cost, lower population densities and difficult terrain conditions.

TracFone can make no such argument. It has no network – no “stake in the ground” – and therefore does not incur any capital costs. The only result that would be derived from TracFone’s collection of universal service subsidies would be increased profit margins for its own benefit, with no corresponding benefit for consumers.⁴ Not surprisingly, then, TracFone provides no support for its primary argument that the rates charged to it by smaller, independent facilities-based CMRS carriers are often “considerably higher” than the wholesale rates charged by major providers.⁵ In Dobson’s experience, it is simply not true that rural America’s rates are “considerably higher.” To the contrary, as Dobson has regularly demonstrated to the Commission, rates in rural America are controlled by the same highly competitive forces that govern rates in urban areas.⁶

⁴ See Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *Federal State-Joint Board on Universal Service*, CC Docket No. 96-45, at 32 (filed May 5, 2003) (“High-cost support should never be confused with a program to simply reduce the rates for telecommunications service charged to an individual end-user.”) (“OPASTCO Comments”)

⁵ Petition at 3.

⁶ See Comments of Dobson Communications Corporation, *Notice of Proposed Rulemaking Regarding Spectrum-Based Services to Rural Areas*, WT Docket No. 02-381, at 5 (filed Dec. 29, 2003)

As Dobson has shown, in virtually every market there are three or four facilities-based carriers providing service directly and through roaming; moreover, regional and national advertising reaches all areas of the country and consumers in rural America demand the same lower rate packages with broad roaming and long-distance features as subscribers in the major cities. Any effort by one local carrier to raise its rates above those generally available from regional and national carriers is likely to result in a loss of subscriber base, and TracFone has not demonstrated that it is regularly charged higher rates for providing resold services in rural areas, much less that such practices would support a need for universal service support.⁷

As noted above, resellers such as TracFone do not incur the significant capital costs of expanding service into these “high cost” areas that the universal service funds are intended to support. To the contrary, resellers’ primary costs are the usage-based wholesale rates they are charged by facilities-based carriers who *have* incurred these capital expenses to extend services into the high cost areas. Universal service funds should be used (and have been used) to provide appropriate incentives for companies actually to incur the substantial expenses associated with constructing or extending

(“[T]he level of services and rates demanded by customers in rural markets are not, in any meaningful way, different from those demanded by urban customers even though the total number of operators [in rural areas] may be lower.”); *see also* Comments of Dobson Communications Corporation, *Notice of Inquiry Regarding Spectrum-Based Services to Rural Areas*, WT Docket No. 02-381, at 2, 4-10 (filed Feb. 3, 2003); Comments of Dobson Communications Corporation, *Notice of Inquiry Regarding Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, at 5 (filed Jan. 27, 2003).

⁷ TracFone states that “CMRS customers who obtain services from resellers, including TracFone’s customers, could be subject to relatively higher rates than are customers of those telecommunications service providers which receive universal service support.” Petition at 6. TracFone, however, is not charging varying rates to customers, as is evidenced by its statement that an advantage of its service is that its prices are uniform across the country, whether urban or rural. Petition at 3. Thus, it is not entirely clear how TracFone’s pricing would be affected even if it were to receive universal service support without departing from its touted “uniform” pricing plan.

wireless networks into high cost areas.⁸ TracFone makes no effort to demonstrate how the grant of universal service funds to a pure reseller would result in *any* expansion of wireless services into areas not already covered, because of course none of its receipts would be used for such facilities-based expansion.

TracFone argues that universal service funds are necessary because wholesale rates are determined through arm's-length negotiations, underlying carriers are under no obligation to resell their services,⁹ and to the extent CMRS carriers receive support, they are not required to pass along any universal service discounts.¹⁰ But TracFone misses the point in this regard. First, no support would be available to pass on to the reseller for resold lines. Because the facilities-based carrier and the reseller are competitors, the facilities-based carrier generally does not have access to the reseller's customers'

⁸ Ironically, but for companies like Dobson who have constructed networks in high cost areas, resellers would not even have the opportunity to provide their services. In fact, the rural carriers have repeatedly made this argument in the ongoing debate as to whether high cost funds should only serve "primary lines." Rural carriers argue that if the Commission does not fund the entire network and instead just funds some of the "lines" of a network, then a carrier serving a rural market will be unlikely to build and/or upgrade its network, having no guarantee of use of the network and a return on its investment. Comments of Alaska Telephone Association, *Federal State-Joint Board on Universal Service*, CC Docket No. 96-45, at 17-18 (filed May 5, 2003); Comments of The Nebraska Rural Independent Companies, *Federal State-Joint Board on Universal Service*, CC Docket No. 96-45, at 22-25 (filed May 5, 2003) (noting that not funding a network violates Section 254(b)(5)'s requirement for sufficiency, "because the support provided would not be sufficient to build and maintain a network to support the total demand at a level and rate that is comparable to service provided in urban areas."). Also, OPASTCO stated that Sections 254(b)(3) and Section 254(e) require that high cost support be "utilized for infrastructure investment in areas where it would not otherwise be economically feasible to provide services at rates that are affordable and reasonably comparable to urban areas of the country." OPASTCO Comments at 31-33 (filed May 5, 2003) (finding support from Section 254(b)(3)'s requirement that rural customers have access to the same services available to urban customers and Section 254(e)'s requirement that universal service support be used "only for the provision, maintenance, and upgrading of facilities and services for which support is intended").

⁹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *First Report and Order*, 11 FCC Rcd 18455 (1996) (noting that the CMRS resale requirements would sunset five years after the date of the award of the last group of initial licenses for broadband PCS; the sunset date was subsequently determined to be November 24, 2002) (subsequent history omitted).

¹⁰ Petition at 9-10.

addresses in order to submit valid line counts for support. Although the facilities-based carrier will not receive support for reseller lines, there is still no justification to provide support to the reseller, since doing so will in no way benefit investment in the network in rural and high cost areas.

Moreover, although CMRS resale rates are not tariffed, they are subject to strong competitive pressures. Giving resellers “support” to increase their profit margins and to further compete with wireless carriers who have made the capital investment to extend their facilities into these high cost areas is thus counterproductive. With this advantage, resellers would be able to reduce their rates below the facilities-based carriers’ rates, which are already restricted by the high state of competition that exists within the CMRS industry; this would further hurt rural carriers by reducing the capital available to create, operate and maintain networks that serve these areas. Simply stated, TracFone is wrong in suggesting that the forbearance it seeks would achieve the goal of “competitively neutral universal service support mechanisms and rules.”¹¹ On the contrary, it would be extremely unfair for a reseller to obtain support when it has not incurred the capital, maintenance and provisioning costs of providing service to its customers in the first place.

Moreover, TracFone does not – and indeed, cannot – argue that it would utilize universal service funding to provide reasonably comparable services in rural areas as compared to urban areas. In fact, as a pure reseller, Tracfone has no control over the kinds of services it can offer or even over the geographic areas wherein service will be

¹¹ *Id.* at 10.

available, and so grant of its forbearance request would not further this fundamental goal of universal service.¹²

II. TRACFONE DOES NOT SATISFY THE TEST FOR FORBEARANCE

Section 10 of the Act permits the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or classes of such carriers or services, if the Commission determines that three conditions are present: “(1) enforcement of such regulation or provision is not necessary to ensure that charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such regulation or provision is consistent with the public interest.”¹³

The FCC can deny TracFone’s petition on the weight of the public interest requirement alone. Based on the analysis provided above – including the inconsistency with basic universal service principles that would be created if resellers are permitted to

¹² It should be noted that the Commission in *Virginia Cellular* and *Highland Cellular* accepted certain commitments from the wireless ETC petitioners in furtherance of its public interest determination. Federal-State Joint Board on Universal Service; *Virginia Cellular, LLC* Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 1563, 1574-80 (2004) (“*Virginia Cellular*”) (establishing public interest criteria); Federal-State Joint Board on Universal Service; *Highland Cellular, Inc.*, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 6422, ¶¶20-33 (2004) (elaborating on public interest requirements). Specifically, with respect to rural telephone company study areas, the Commission in *Virginia Cellular* concluded that the “value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas.” *Virginia Cellular*, 19 FCC Rcd at 1565. Simply put, as a reseller, TracFone’s service is limited by the geography and the quality of the other facilities-based carriers, and TracFone cannot make any of the commitments required by the *Virginia Cellular*.

¹³ 47 U.S.C. § 160(a)(1)-(3).

receive support and the fact that TracFone's resale service does not encompass any commitments similar to *Virginia Cellular* and *Highland Cellular* – there can be no argument that it is in the public interest to forbear from Section 214's requirement that an ETC provide service using its own facilities or a combination of its own facilities and those of another carrier's.

CONCLUSION

As noted above, resellers should not receive universal service support because they do not face the same capital, maintenance or provisioning costs as do carriers who build and maintain facilities in rural and high cost areas. Also, resellers remain free to negotiate agreements to purchase bulk services at a rate that is reflective of a highly competitive CMRS marketplace. Facing analysis of the current universal service funding mechanisms, the Commission should not seek to fund carriers who have no "stake in the ground." For the foregoing reasons, the Commission should deny TracFone's Petition for Forbearance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pervenia Brown, do hereby certify that on this 26th day of July 2004, a copy of the foregoing OPPOSITION TO TRACFONE PETITION FOR FORBEARANCE was served by first-class mail, postage prepaid on the following:

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